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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-136167

DATE: June 25, 1985

MATTER OF: Major John E. Doyle

DIGEST: A retired enlisted man who is advanced on the retired list to the highest commissioned grade in which he served on active duty is subject to the dual compensation restrictions in effect at the time of his retirement. He is not entitled to the exemption from these restrictions granted to Reserve officers.

We have been asked to reconsider decision B-136167, February 4, 1963, which denied the claim of Major John E. Doyle, a retired officer of the Air Force, for retired pay withheld pursuant to dual compensation restrictions while he held a position as a civilian employee of the United States.^{1/} Major Doyle claimed that he was entitled to an exemption from the dual compensation provision by virtue of his status as a temporary officer. For the following reasons we must sustain the earlier decision.

Major Doyle served 21 years as an enlisted member of the Army. In 1942 he received a temporary appointment as a commissioned officer in the Army of the United States.^{2/} He served under successive temporary appointments as a commissioned officer through October 7, 1952.^{3/} He also held a Reserve commission as a major continuously from July 2, 1947. Although he never served on active duty under his Reserve commission, he served as an officer under his temporary commission until he was released from active duty as a temporary major on October 7, 1952, for the purpose of reenlisting in the Regular Air Force. On October 31, 1952, he was retired as a master sergeant, Regular

^{1/} Major Doyle is deceased. His widow, through counsel, is requesting this reconsideration.

^{2/} This appointment was authorized by the act of September 22, 1941, ch. 414, 55 Stat. 728.

^{3/} His continued service was authorized by section 515 of the Officer Personnel Act of 1947, approved August 7, 1947, ch. 512, 61 Stat. 795, 906.

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Air Force,^{4/} and was advanced immediately on the retired list to the grade of captain.^{5/} He was later advanced to the grade of major on the retired list.^{6/}

Subsequent to his retirement, he was employed by the Government in a civilian capacity. As a result he became subject to the dual compensation limitations of the Economy Act of 1932,^{7/} which caused his retired pay to be reduced.

Section 212 of the Economy Act of 1932, as amended, provided that any person holding a civilian office or position under the United States whose compensation, when combined with retired pay received on account of service as a commissioned officer exceeded a certain amount, must elect to retain either the compensation from the civilian position or the retired pay. An exemption from this restriction was made for Reserve officers.^{8/} The question is whether Major Doyle was entitled to the exemption.

Court cases and decisions of this Office concluded that officers receiving temporary appointments in the Army of the United States were entitled to the "same rights, privileges, and benefits as members of the Officer Reserve Corps of the same grade and length of active service" under

^{4/} Retirement was authorized by the act of March 2, 1907, ch. 2515, 34 Stat. 1217.

^{5/} Pursuant to section 203(e) of the act of June 29, 1948, ch. 708, 62 Stat. 1081, 1086.

^{6/} Pursuant to the act of May 31, 1956, ch. 348, 70 Stat. 222.

^{7/} Section 212 of the Economy Act of 1932, June 30, 1932, and ch. 314, 47 Stat. 382, 406, as amended, 5 U.S.C. § 59a §(1952 ed., 1958 ed.).

^{8/} Section 1(b) of the act of July 1, 1947, ch. 192, 61 Stat. 239.

the 1941 act.^{9/} However, this act was repealed in 1947. Since Major Doyle continued to serve on active duty in the temporary grade of major in the Air Force of the United States he could not avail himself of the benefits of the 1941 act. Thus, Major Doyle was not entitled to the exemption granted to Reserve officers under the Economy Act, which by virtue of the language of the 1941 act as amended, applied to temporary officers of the Army of the United States.

Counsel for Major Doyle's widow notes that similar language applicable to temporary officers of the Army and the Air Force of the United States was provided in the Officer Personnel Act of 1947, which is controlling in Major Doyle's case. He argues that as a result, Major Doyle should have been granted the exemption from the limitations of the Dual Compensation Act.

While it is not emphasized in our initial decision in Major Doyle's case, this point was considered. Although the Officer Personnel Act of 1947 did contain language similar to the 1941 act as amended, there was a significant difference in the wording of the statutes. The later and controlling act provided that temporary officers were entitled to the same rights, privileges and benefits as members of the Officers' Reserve Corps only while serving on active duty. Thus, this provision provided no relief to temporary officers who were not serving on active duty. The Court of Claims in Gradall v. United States, 157 Ct. Cl. 490 (1962), held that individuals receiving retired pay as temporary officers who became entitled to such pay after repeal of the 1941 act were not exempt from the dual compensation provisions of the 1932 act.

In summary, our prior decision that Major Doyle was not exempt from the dual compensation provisions of Section 212 of the Economy Act of 1932 was not based upon his status as a Regular officer (he was not a Regular officer), but on his status as a temporary officer entitled to retired pay. A temporary officer becoming entitled to retired pay on the basis of that status after 1948 was not

^{9/} See note 2, above.

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entitled to an exemption from the dual compensation provisions of the Economy Act. Accordingly, we must affirm our decision of February 4, 1963.

Milton J. Foster
Acting Comptroller General
of the United States